

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Kallys Albert, Sr.,

Civil No. 12-1224 (DWF/FLN)

Plaintiff,

v.

**ORDER ADOPTING REPORT
AND RECOMMENDATION**

Principal Financial Group,
Principal Life Insurance Company,
Orion Associates/Meridian Service,
Inc., Stephen Hage, and John Doe,

Defendants.

The above matter comes before the Court upon the Report and Recommendation of United States Magistrate Judge Franklin L. Noel dated February 22, 2013. No objections have been filed to that Report and Recommendation in the time period permitted. The factual background for the above-entitled matter is clearly and precisely set forth in the Report and Recommendation and is incorporated by reference. Based upon the Report and Recommendation of the Magistrate Judge and upon all of the files, records, and proceedings herein, the Court now makes and enters the following:

ORDER

1. Magistrate Judge Franklin L. Noel's February 22, 2013 Report and Recommendation (Doc. No. [54]) is **ADOPTED**.
2. Defendants' Motion to Dismiss (Doc. No. [38]) is **GRANTED in part** and **DENIED in part**, as follows:

a. To the extent Defendants seek to dismiss counts four, six, seven and eight, the motion is **GRANTED** and the counts are **DISMISSED WITH PREJUDICE**.

b. To the extent Defendants seek to dismiss all ERISA conspiracy claims in count one, two, three and five, the motion is **GRANTED**.

c. To the extent Defendants seek to dismiss counts one, two, three and five against them in their individual capacities, the motion is **DENIED**.

3. Plaintiff's motion for default judgment (Doc. No. [36]) is **DENIED**. Default judgment is appropriate only after one is properly served and "a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend" Fed. R. Civ. P. 55(a). Although Defendants now stipulate to service by mail, they were not properly served by Plaintiff. Therefore, default judgment is not appropriate.

4. Plaintiff's motion for judgment on the pleadings (Doc. No. [46]) is **DENIED**. Judgment on the pleadings should be granted only if it "appears beyond a doubt that the [non-movants] can prove no set of facts which would entitle [them] to

relief.” *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). Plaintiff has not met this burden.

Dated: March 19, 2013

s/Donovan W. Frank
DONOVAN W. FRANK
United States District Judge